No. 75-1264

Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,

Petitioner,

v.

ROBBINS & MYERS, INC., ET AL.,

Respondents.

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 525 F.2d 124, and is attached to the Petition for Writ of Certiorari in this case as Appendix A (Pet. App. 1a-12a).[1] The Order of the Court of Appeals denying rehearing, entered on December 9, 1975, appears at Pet. App. 13a. The opinions

[1] References to the appendices to the Petition for a Writ of Certiorari appear herein as "Pet. App." References to the Joint Appendix appear as "App."

of the District Court are not officially reported, are unofficially reported at 8 FEP Cases 309, 311, and 313, and appear at Pet. App. 14a-29a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1975. A timely petition for rehearing was denied on December 9, 1975 (Pet. App. 13a), and the petition for certiorari was filed on March 5, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a union member may be denied access to the administrative and judicial remedies for employment discrimination provided by Title VII of the Civil Rights Act of 1964 for failure to file a charge with the Equal Employment Opportunity Commission within the time limit set by 42 U.S.C. 2000e-5, if such a charge was filed within the requisite time period as calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force?

2. Whether the 1972 Amendments to Title VII, extending from 90 to 180 days the time for filing a charge with the EEOC, rendered timely any charge before the EEOC on the effective date of the Amendments and alleging discriminatory acts less than 180 days before that date?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are attached hereto as Appendix A (1a-3a):

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964).

(2) Section 706(b) and (e) of the Civil Rights Act of 1964, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)).

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972).

(4) Sections 201 and 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 152, 153 (June 23, 1947) (29 U.S.C. §§ 171 and 173(d)).

STATEMENT OF THE CASE

A. *The Facts*

Dortha Guy is a black woman who was employed by respondent Robbins & Myers, Inc. ("the Company") (App. 6a, 12a, 25a). She was a member of the petitioner, Local 790 of the International Union of Electrical, Radio and Machine Workers ("IUE" or "the Union"), the exclusive bargaining representative of all production and maintenance employees of the Company, and at the time of the events which precipitated this lawsuit was a union steward (App. 17a, 29a). In her capacity as a steward, she was responsible for the filing of grievances under the collective bargaining agreement on behalf of her fellow employees (App. 36a).[2]

In October, 1971, Ms. Guy was absent from work because

[2] The collective bargaining agreement in force provided a three-step grievance procedure for "[a]ll differences, disputes, and grievances that may arise after the signing of this Agreement between the Union, any employee or group of employees, and the company concerning the application or interpretation of this Agreement." A fourth step, arbitration, was provided for grievances "involving a claimed violation of a specific provision of this Agreement" (App. 36a-37a).

of authorized sick leave. Although she was scheduled to return to work on October 24, 1971 she did not return on that day (Pet. App. 20a). The following day the Company discharged her on the ground that she had not complied with procedures embodied in the collective bargaining agreement pertaining to return from leaves of absence (App. 6a-7a, Appendix B, p. 5a, *infra*).[3] A grievance protesting the "unfair action" of the Company in discharging her was filed on October 27, 1971 (App. 18a). Thereafter, the Union processed the grievance through the first three steps of the grievance procedure.[4] The Company denied the grievance at the third step on November 18, 1971, and Ms. Guy decided not to pursue it further (App. 3a, 17a).[5]

[3] Appendix B hereto (pp. 4a-6a) is the EEOC Determination on Ms. Guy's charge, Case No. YME4-155. This Determination was "filed as part of the record in this cause" (Pet. App. 27a) but inadvertantly omitted from the Joint Appendix.

[4] The third step of the grievance procedure took place "[b]etween the Union Officers • • • and representatives of management." (App. 36a.)

[5] As noted, the grievance stated simply that the discharge was "unfair." The collective bargaining agreement had, in addition to provisions substantively governing leaves of absence, return therefrom, and discharges, a section prohibiting discrimination in the application of the contract "on account of sex, race, color, creed, or national origin." (App. 35a.) Ms. Guy's contention before the Equal Employment Opportunity Commission ("EEOC") was that her discharge was not proper under the substantive provisions governing leaves of absence as interpreted with regard to other employees, and that the true reason for her discharge was racial discrimination. (App. 11a, Appendix B, pp. 4a-5a, *infra*.) The extent to which her grievance was articulated in this way through the grievance steps pursued on her behalf, and whether or not the anti-discrimination clause was explicitly relied on through those steps, does not appear in the record as it now exists. Moreover,

On February 10, 1972—108 days after the effective date of her discharge, but less than 90 days after the completion of the grievance procedure—Ms. Guy filed a charge of racial discrimination with the EEOC against both the Company and the Union relating to her discharge (App. 5a, 25a, Pet. App. 21a). The EEOC determined that "the timeliness and all other jurisdictional requirements have been met" (Appendix B, p. 4a, *infra*.), investigated the charge, and found no probable cause to believe that either the Company or the Union had engaged in racial discrimination with regard to Ms. Guy (*Id.*, p. 6a, *infra*), and issued a

nothing appears in the record to demonstrate the extent to which specificity in the written grievance was required in the grievance-arbitration procedure. It is a well established principle of arbitration procedure that a general statement of the incident complained about is sufficient to permit raising any claim based on the agreement at the various steps of the procedure. See *Capital Airlines, Inc.*, 30 LA 836, 839 (William H. Coburn, 1958); *Charles Eneu Johnson Co., Inc.*, 17 LA 125, 129 (A. Langley Coffey, 1950); *Firestone Tire & Rubber Co.*, 20 LA 880, 882 (George A. Gorder, 1953); *Harvard Mfg. Co.*, 51 LA 1098, 1100 (Samuel S. Kates, 1968); *Petroleum Chemicals Inc.*, 37 LA 42, 46 (Paul M. Hebert, 1961); *Hayes Aircraft Corp.*, 33 LA 847, 850 (John A. Griffin, 1959); *Vulcan Mold & Iron Co.*, 40 LA 1266, 1270-1272 (John F. Sembower, 1963); *Package Machinery Co.*, 41 LA 47, 48-49 (James V. Altieri, 1963); *Associated Transcript Inc.*, 50 LA 236, 238-239 (Bernard Dunau, 1968). The statement on the grievance form, as occurred here (App. 18a), that the discharge was "unfair," embraces all forms of unfairness, including race discrimination. The Company's contention throughout the lower court proceedings was that the pursuit of the grievance procedure could have no effect in any circumstance upon the time limit for filing a Title VII charge with the EEOC (App. 23a), and the motion to dismiss was granted on this basis (Pet. App. 24a, 29a). Consequently, it never became material to inquire further into the precise basis for the grievance.

"right to sue" letter on November 20, 1973.[6] Ms. Guy then instituted this lawsuit under 42 U.S.C. § 2000e-5 (App. 4a).

B. *District Court Proceedings*

The Company moved to dismiss on several grounds, including the ground that the suit was barred because the EEOC charge was not filed within 90 days of the discharge (App. 14a).[7] The District Court noted that the charge was filed less than 90 days from the termination of the grievance procedure, and that several Courts of Appeals had held that the time for filing an EEOC charge should be adjusted so as not to take into account the period of pendency of a formal grievance pursued in accord with a collective bargaining agreement (Pet. App. 21a, 22a).[8] But

[6] A finding of no probable cause is not a bar to a private suit under Title VII. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n. 8.

[7] At the time Ms. Guy was terminated, and at the time she filed her EEOC charge, the time limit for filing an EEOC charge was 90 days. Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964) (Pet. App. 30a). The time limit was extended to 180 days as of March 24, 1972, and the section dealing with that time limit was renumbered as § 706(e). Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. § 2000e-5(e).

[8] *Culpepper* v. *Reynolds Metal Co.*, 42 F.2d 888 (5th Cir. 1970); (see also *Hutchings* v. *U.S. Industries*, 428 F.2d 303 (5th Cir. 1970)); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972). As the District Court recognized (Pet. App. 26a), the Sixth Circuit seems to have adhered to the *Culpepper* rule for a time. *Schiff* v. *Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970). Two days after the District's Court's final opinion in this case, another Court of Appeals adopted the rule of the *Culpepper* line of cases. *Sanchez* v. *TWA*, 499 F.2d 1107 (10th Cir. 1974).

the court, noting that "'a typical lay-off, *without more* * * * is a completed act at the time it occurs, so that a [Title VII] charge alleging a discriminatory lay-off must *ordinarily* be filed within 90 days thereafter,' (*Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891 (D. Me 1970; emphasis added)" (Pet. App. 21a), held that this rule "is not [affected] or abated or tolled by an independent grievance arbitration procedure under a contract" (Pet. App. 24a), and granted the motion to dismiss. The court regarded the rationale of the earlier court of appeals cases as undermined by this Court's opinion in *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36 (Pet. App. 26a).[9]

Following the District Court's dismissal of the suit against the Company, Ms Guy and the Union jointly moved to have the Union realigned as a party plaintiff for purposes of appeal (App. 31a-32a). The Union noted it had "endeavored to protect all unit employees whom [it represents] from discrimination because of race" and that it was "interested to see that its members' rights to use their contractual grievance procedure [are] maintained and protected" (App. 35a, 38a). This motion was granted (App. 39a), and the district court's decision was appealed.

C. *The Court of Appeals Opinion*

On October 24, 1975, the Court of Appeals affirmed the

[9] The District Court recognized that Title VII had been amended on March 24, 1972 to extend the time limitation upon filing a Title VII charge to 180 days. (Pet. App. 20a; see note 7, p. 6, *supra*.) Ms. Guy's discharge occurred 150 days prior to the effective date of the 1972 amendment; and her charge was before the EEOC on the effective date. The District Court, however, regarded the amendment as inapplicable. (Pet. App. 20a.)

dismissal of the suit (Pet. App. 9a). The Court held, first, that pendency of the grievance procedure could not affect the 90-day time limit under § 706(d). Although *Alexander* v. *Gardner-Denver Co., supra,* had not addressed any time limitation question, it viewed that case as holding that the 90-day limitation must be construed strictly and without exceptions (Pet. App. 5a). Further, the Court reasoned that since Title VII "creates a right and liability which did not exist at common law and prescribes the remedy [,] [t]he remedy is an integral part of the right and its requirements must be strictly followed," citing *The Harrisburg,* 119 U.S. 199, 214 (Pet. App. 4a-5a). Thus, the Court held that it was powerless to adjust the statutory period even if such adjustment would effectuate Title VII's underlying policies. The Court also thought that *Alexander, supra,* and *Johnson* v. *REA, Inc.,* 421 U.S. 454, because they emphasized the independence of Title VII from other legal routes to relief from employment discrimination, counseled against tolling Title VII time limitations to permit the effective pursuit of grievance procedures (Pet. App. 4a).[10]

The Court of Appeals also addressed the question of the effect of the 1972 amendments, a question raised in that court by the EEOC appearing as amicus curiae.[11] The Court (Judges Weick and Peck) held that the 1972 amendments extending the time to file EEOC charges to 180 days, effective March 24, 1972, do not apply to this case, since "Guy's claim was barred on January 24, 1972" and "[t]he subse-

[10] The Court found *Culpepper, Hutchings, Malone,* and *Moore,* unpersuasive because they were decided before *Alexander,* and *Sanchez* unpersuasive because it relied on these four pre-*Alexander* cases.

quent increase of time . . . could not revive plaintiff's claim" (Pet. App. 8a-9a). Judge Edwards, dissenting on this point, noted that the Ninth Circuit, in *Davis* v. *Valley Distributing Co.,* 522 F.2d 827 (9th Cir. 1975), had recently held that "the extended limitations period [applies] to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." (522 F.2d, at 830; Pet. App. 10a). Judge Edwards would have remanded to the District Court to consider the *Davis* rationale and its applicability to the present case (Pet. App. 12a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below has held that an employee forfeits his right to the protection of Title VII if he pursues a grievance under a collective bargaining agreement for more than 90 days [12] without filing an EEOC charge. All other courts of appeals to consider the question—the Fifth, Seventh, Ninth, and Tenth Circuits — have held to the contrary.[13] These circuits have concluded that the time for filing an EEOC charge is tolled during the period that such a grievance is being pursued.

[11] The Court of Appeals believed it was not compelled to address this argument since it had not been raised below. (Pet. App. 8a.) Nonetheless, it did reach the issue and decide it. (Although the effect of the 1972 amendment was not expressly discussed by the parties in the District Court, that Court was aware of the amendment but decided it was inapplicable to this case. See note 9, *supra.*) In this circumstance, the issue is properly before this Court.

[12] The 1972 amendments extended the filing period to 180 days. The holding of the court below would be equally applicable to post-1972 cases, where grievance pursuit exceeds 180 days.

[13] See cases cited *supra,* note 8.

We agree with the *result* reached by these circuits, but for a more basic reason. The limitations period established by § 706(e) (§ 706(d) prior to the 1972 amendments)[14] runs from the date "the alleged unlawful employment practice occurred." Tolling is required only where a time limit otherwise would expire; here, as we show in Part I, the time limit does not begin to run until the grievance-arbitration process is completed.

In a case like the instant one, analysis of the question when an alleged unlawful employment practice "occurs" requires an understanding of the "system of industrial self-government"[15] — the grievance-arbitration process — through which the final personnel determination is made. Under a collective bargaining agreement such as is applicable here, though management reserves the right unilaterally to take a personnel action in the first instance—such initial action of course constitutes an "occurrence" within the meaning of § 706(e)—it cedes its power to make a final personnel decision to the processes of the grievance-arbitration system. When an employee chooses to invoke those processes—as is his contractual right notwithstanding the employer's initial action—the final "management" action will be determined by the system.

The proposition that the completion of the grievance-arbitration process is an "occurrence" for the purposes of

[14] Prior to the 1972 amendments, the time limit appeared in § 706(d) of the Act. The 1972 amendments, in addition to enlarging the time limit, relettered the paragraphs of § 706 so that the time limit now appears in § 706(e). We use § 706(e) to refer to the time limit both before and after the 1972 amendments.

[15] *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580 (1960).

§ 706(e) not only accords with industrial reality, it is the only reading of Title VII that furthers the Act's primary objective: to stimulate voluntary, private implementation of the federal policy against employment discrimination—to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 55 (1974), the grievance-arbitration process is a vital instrument by which employers and unions can accomplish the self-evaluation and self-correction mandated by Title VII. When the employee retains confidence in the private system, requiring the filing of an EEOC charge before the grievance-arbitration procedure has concluded would inject the federal government into the process at a time when the private mechanisms might yet prove sufficient to solve the problem. Moreover, that reading of § 706(e) would, contrary to Congress' preference, produce "more litigation, not less," *Alexander, supra*, 415 U.S. at 59. Permitting the grievance-arbitration process full play (so long, of course, as the employee elects to withhold his EEOC charge to allow the private process to work) inevitably will reduce the burden imposed upon the EEOC and the courts.

Only if the Court rules, contrary to our contention, that the completion of the grievance-arbitration process is not a separate "occurrence" within the meaning of § 706(e), does it become necessary to consider the need for tolling. In that event, as we show in Part II, the rule adopted by the other Circuits, in conflict with the holding below, is a proper

application of traditional principles governing equitable adjustments of statutes of limitations and furthers the primary goal of Title VII to foster private, voluntary implementation of the federal policy against employment discrimination. Not to allow for tolling here would be to encourage premature governmental intrusion into and interference with private sector mechanisms designed to resolve employment disputes, and would needlessly burden the already backlogged EEOC and courts.

In Part III we show that, in any event, even if the only "occurrence" is the initial management determination, and even if the statutory period is not tolled during resort to the grievance-arbitration process, the charge here was timely filed with the EEOC. The 1972 Amendments to Title VII extended the limitations period of § 706(e) from 90 to 180 days. This case belongs in that limited category of cases in which charges were filed with the EEOC when more than 90 days had passed from the initial discharge determination but were pending with the EEOC when the 1972 Amendments went into effect less than 180 days after the initial discharge determination was made. Section 14 of the 1972 Act, declaring the § 706 amendments "applicable with respect to charges pending with the Commission on the date of enactment of this Act," renders the charge here timely even if it were not otherwise so.

ARGUMENT

I.

WHEN A DISCHARGED EMPLOYEE ELECTS TO PURSUE HIS CONTRACTUAL RIGHTS UNDER THE GRIEVANCE-ARBITRATION PROCEDURES OF A COLLECTIVE BARGAINING AGREEMENT, AND TO DE-

FER INVOCATION OF HIS STATUTORY RIGHTS UNDER TITLE VII UNTIL HE LEARNS THE OUTCOME OF HIS CONTRACTUAL QUEST, THE TIME LIMIT FOR FILING AN EEOC CHARGE DOES NOT BEGIN TO RUN UNTIL THE COMPLETION OF THE GRIEVANCE-ARBITRATION PROCEDURES.

An employee who is fired suffers an immediate injury—the loss of work and the loss of the present enjoyment of the wages paid for that work. Thus, if he believes the discharge was discriminatorily motivated, he may immediately file an EEOC charge. Title VII permits such an employee to file a charge upon the occurrence of an alleged unlawful employment practice. See § 706(e). This is so even if the employee is covered by a collective bargaining agreement containing a grievance-arbitration procedure: his *statutory* right to reinstatement is separate from whatever *contractual* rights he may have, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 50, 52 (1974), and he cannot be *required* to exhaust his contractual remedies as a precondition to invoking protection of his statutory rights. *Id.* at 59.

Often, however, as here, the employee will *prefer* to pursue his contractual rights first, and to turn to the EEOC for assistance only if his contractual remedies prove unavailing. (As we show *infra*, pp. 31-35, there are valid reasons why an employee may prefer this course). The principal question presented in this case is whether, if a discharged employee elects this course, the statutory time limit runs from the date of discharge (as the court below held) or, as we contend, from the date that the grievance-arbitration process is concluded (either by running its course, or because the employee has exercised his right to opt out of the system and resort to the EEOC).

Under the latter rule, an employee would not forfeit his right to go to the EEOC by first pursuing his contractual remedies. This rule is consistent with the statutory language and this Court's precedents, follows from an understanding of the "system of industrial self-government" erected by a collective bargaining agreement, *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580 (1960), and is necessary to effectuate the "primary objective" of Title VII, private self-correction.

The limitations period established by § 706(e) runs from the date "the alleged unlawful employment practice occurred." A "discharged" employee suffers an immediate loss that is an "occurrence" which entitles him, if he wishes, immediately to invoke the processes of the EEOC. But under the system erected by the parties, that discharge does not mark the termination of the employee's contractual ties to his job. The parties have provided a machinery by which the decision to discharge will be reconsidered by successively higher-ranking management officials, and ultimately by an arbitrator. Only at the conclusion of that process does the employee learn whether his contractual tie to his job will be severed. If the process ends unfavorably to him, he then suffers the severance of his contractual relationship, which, like the earlier "discharge," is an "occurrence" for purposes of § 706(e).

In a plant where there is no contractually established grievance-arbitration process, an employer's declaration that an employee is discharged is in all respects a final occurrence. It not only deprives the employee of immediate work opportunities and wage payments, but also marks the end of whatever individual "contractual" tie the the em-

ployee had to his job. If such an employee believes the discharge was discriminatorily motivated, the time for filing an EEOC charge perforce runs from the date of discharge, and only from that date.

But even in such a plant, the considerations would be different if an employee were told by his supervisor: "I am suspending you from work immediately, and I am recommending to my superiors that you be fired. You will be notified when they have acted upon my recommendation." In that event, the suspension is an immediate "occurrence" which the employee could challenge under Title VII. But a later decision by higher management officials that the employee is discharged would be a separate "occurrence," for unlike the earlier decision it would mark the permanent severance of the employee's tie to his job.

Properly understood, a "discharge" in a plant where there *is* a collective bargaining agreement containing a grievance-arbitration procedure is like the suspension in a plant where there is no such procedure. However final-sounding the label "discharge," the parties have erected a system of industrial self-government under which the decision is *not* final.

Under that system, the *initial* decision to discharge an employee is made by someone in management and that initial decision triggers the immediate removal of the employee from his work-place, but the *final* decision is made later and under carefully prescribed standards and procedures. The agreement provides, substantively, that management may discharge employees only under specified conditions, typically (as here) only if there is "just cause"

for discharge and if the decision is not discriminatorily motivated. And it provides, procedurally, that the decision will be reconsidered at several steps.

The grievance procedure entitles the "discharged" employee to reconsideration of the decision by successively higher-ranking management officials. And if the decision remains unchanged through the grievance steps, there is ultimate resort to an arbitrator, who is, in effect, the ultimate "management" official, and who will make the final decision whether the discharge is justified. He has been chosen "because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment." *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 378 (1974), quoting *Warrior & Gulf, supra,* 363 U.S. at 582. His role is "to bring his informed judgment to bear in order to reach *a fair solution of the problem.*" *United Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593, 597 (1960) (emphasis added).

In carrying out this responsibility,

> "arbitrators have developed through the years certain norms to guide them in the determination of just cause. J. Fred Holly, in an analysis of over one thousand discharge cases, found the following to be among the more prominent of such standards.
>
> 1. Work rules must be known to the employee, and they must be reasonable.
>
> 2. There must be substantial proof of the rule violation, and the burden of this proof rests on the employer.
>
> 3. Administration of the rules must be consistent. Individual employees may not be singled out for discipline, and past practice may be a controlling consideration.
>
> 4. Where employees are held to particular standards, those standards must be reasonable.
>
> 5. Employers must not be arbitrary, discriminatory, or capricious in the administration of discipline.
>
> 6. The existence of mitigating circumstances such as seniority, prior work record, provocation in insubordination and altercation cases may require reduction of penalty."[16]

The "almost universal" rule is that management has the burden of proving to the arbitrator the existence of just cause for imposing discipline. *National Lawyers Club, Inc.,* 52 LA 547, 551 (Seidenberg, 1969); see generally, cases digested in BNA Labor Arbitration Cumulative Digest and Index, § 118.315. This rule reflects the understanding of the industrial relations community that the employer "has agreed to share his authority and no longer has sole and unilateral control over . . . disciplinary sanctions for employee violations of the provisions of the collective agreement"; instead, "if the employer is to prevail in contested matters involving discipline, it must be prepared to convince the Union [or ultimately the arbitrator] that its disciplinary action was founded on just or good cause." *National Lawyers, supra,* 52 LA at 551.

Thus, the processing of a grievance to arbitration is not

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[16] McDermott and Newhams, *Discharge-Reinstatement: What Happens Thereafter,* 24 Ind. & Lab. Rel. Rev. 526, 527 (1971), citing Holly, *"The Arbitration of Discharge Cases: A Case Study,"* Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators (Washington, D.C.: Bureau of National Affairs, 1957), pp. 5-8.

an "appeal" of management's decision. It is, rather, the means by which those officials who wish to discharge an employee are called upon to persuade the ultimate decision-maker—the "proctor" of the system of industrial self-government, *Alexander, supra,* 415 U.S. at 42—that such action is appropriate. If the proponents of discharge cannot meet that burden—if they cannot convince the arbitrator that there is just cause for discharge under the established rules —the employee returns to the job and is made whole for his interim losses.[17]

In sum, an initial declaration that an employee is "discharged" is not, under the "system of industrial self-government" present here, by its own force a final determination. The employee retains his tie to the work-place unless and until the grievance-arbitration procedure has been concluded unfavorably to him. Only then can he assess whether the *final* resolution is one which violates his rights under Title VII and thus warrants resort to the statutory procedures.

Construing § 706(e) in accord with the realities of the grievance-arbitration process conforms the administration

[17] Moreover, among the arbitrator's powers, under most contracts, is the power to modify the penalty—to reduce a discharge to a lesser sanction (e.g., suspension for a limited period), even where employee culpability is clear. See, e.g., *Lynchburg Foundry Co.* v. *United Steelworkers,* 404 F.2d 259 (4th Cir. 1968). This power is widely exercised. See generally cases digested in BNA, Labor Arbitration Cumulative Digest and Index, § 118.03; McDermott and Newhams, *supra,* 24 Ind. & Lab. Rel. Rev. at 527, 529. Its availability impels the parties, in the steps of the grievance procedure, to consider "settling" the grievance of even a clearly culpable employee by converting the discharge to a lesser penalty.

of Title VII to its "primary objective"—the "prophylactic one" of stimulating voluntary, private implementation of the federal policy against employment discrimination—causing "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975). For only this construction begins the running of the statutory time limit at the conclusion of the parties' efforts at private compliance.

The grievance-arbitration process is a vital instrument by which employers and unions can accomplish the self-evaluation and self-correction mandated by Title VII. As this Court recognized in *Alexander, supra,* 415 U.S. at 55:

"[T]he grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means of resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective bargaining agreement contains a non-discrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum."

See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 66-67 (1975).

Responsive to Title VII's commands, unions and employers in growing numbers have incorporated prohibitions against employment discrimination into their collective bargaining agreements. Today, nearly three-fourths of all collective bargaining agreements have non-discrimination clauses paralleling Title VII's strictures, compared to only 28% in 1965 and 46% in 1970.[18] These clauses assure that discrimination claims are susceptible to resolution through the grievance-arbitration processes. A number of unions—the IUE prominent among them—have undertaken aggressive programs to cure discriminatory practices through grievance-arbitration, a phenomenon which has been recognized and applauded by EEOC representatives. Hammerman and Rogoff, *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest No. 3, 22, 27-28, 30-33 (1975).[19] Arbi-

[18] Bureau of National Affairs, 2 Collective Bargaining Negotiations and Contracts, 95:5 (1975) (based on a representative sample of 400 contracts, see *id.*, at 32:21).

[19] The authors, special assistants to the EEOC's Director of Compliance, describe (*id.* at 27-28) the IUE's model contract provisions designed to strengthen the amenability of the grievance-arbitration process to discrimination claims, undertaken in response to this Court's enumeration in *Alexander* of "the main weaknesses of the arbitral forum in relation to Title VII grievances," and further describe the IUE's expansive program for eradicating employment discrimination throughout those segments of the economy whose members it represents, *id.* at 30-32.

The IUE's program of using grievance-arbitration procedures to remedy violations of Title VII was put in evidence, and findings with respect to its purpose and effect were made, in the decision of Administrative Law Judge Marvin Roth in Westinghouse Electric

trators have over the years regularly been presented with grievances alleging discrimination because of race or sex and have awarded relief where they found the grievances well founded.[20]

Moreover, a grievance need not allege violation of a non-discrimination clause in order to trigger a proceeding that furthers the objectives of Title VII. Even under an agreement which did not contain such a clause, an employee who

Corp., NLRB Case No. 6-CA-7680, JD-86-76 (February 17, 1976), pp. 8-9, 11, 21-22, 24-27.

Where the IUE has been unsuccessful in securing correction of discrimination under the grievance-arbitration machinery, IUE files charges with EEOC and law suits under the Equal Pay Act and Title VII. See for example: *General Electric Co.* v. *Gilbert*, now pending in this Court, Nos. 74-1589 and 74-1590; *Rinehart* v. *Westinghouse Electric Corp.*, 3 FEP Cases 851 (1971); *IUE* v. *Westinghouse*, USDCND WVa Civ. Act. No. C-75-62-F; *Biablocki and IUE* v. *Westinghouse*, USDCWD NY Civ. No. 75-467; *Nutter* v. *Westinghouse*, USDCSD Oh. ED No. C-2-75-602; *Austerman* v. *Westinghouse*, USDCWD Pa. Civil Action No. 75-229; *IUE and Moore* v. *Westinghouse*, USDCD NJ Civ. No. 75-1871; *Eberts and IUE* v. *Westinghouse*, USDCD NJ Civil Action No. 75-1879; *IUE* v. *Westinghouse*, USDCD NJ No. 75-1870; *IUE and Adams* v. *Westinghouse*, USDCWD Pa. Civ. Act. No. 74-570.

[20] See, e.g., the following decisions which are representative: *Swift & Co.*, 17 LA 537 (Ralph T. Seward, 1951), awarding the same prehire seniority remedy as was approved by this Court in *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976); *American Potash & Chemical Corp.*, 3 LA 92 (John A. Lapp, 1942), Mexicans demoted from leadmen positions when employees refused to work under them awarded right to first opportunity for next openings for leadmen; *Bethlehem Steel Co.*, 2 LA 187, 189-191 (Paul A. Dodd, 1945), reinstatement and back pay awarded black discharged due to racial prejudice of plant guard; *Tennessee Products & Chemical Corp.*, 20 LA 180 (W. H. F. Millar, 1953), back pay awarded where nondiscrimination clause violated by promoting

believed he had been discharged because of his race could file a grievance alleging that the discharge was without "just cause," and would secure reinstatement if the management officials initiating the discharge were unable to meet their burden of proving the existence of just cause for the discharge. In that event, Title VII's goal of equal employment opportunity would be achieved.

Congress' preference for private self-correction thus dictates construing the conclusion of the private effort as the starting point for the § 706(e) time limit. That construction is also necessary if the mechanisms established by Congress to handle cases not privately resolved are to be able properly to perform their functions, for if the EEOC and the courts are burdened with *unnecessary* cases, their ability to

four white employees instead of four black employees to leadmen jobs; *Tri-City Container Corp.*, 42 LA 1044 (Paul Pigors, 1964), where test discriminatory new nondiscriminatory testing awarded; *Albertson's Inc.*, 59 LA 1119 (Edmund D. Edelman, 1972); *Memphis Light, Gas & Water Div.*, 59 LA 1040 (Ralph Roger Williams, 1972); *Northrup Corp.*, 65 LA 400 (Syd N. Rose, 1975); *Lianco Containers Corp.*, 73-1 ARB ¶ 8144 (Paul C. Dugan, Arbitrator); *McCall Corp.*, 67-2 ARB ¶ 8498 (Robert G. McIntosh, Arbitrator); *Newspaper Guild of New York*, 63 LA 1064 (Maurice C. Benewitz, Arbitrator, 1974); *United States Postal Service*, 60 LA 206 (G. Allan Dash, Jr., Arbitrator, 1973); *Rex Chainbelt, Inc.*, 56 LA 224 (Samuel Edes, Arbitrator, 1971); *Reynolds Metals Co.*, 55 LA 1168 (Howard S. Block, 1970).

Sex: *Buco Products, Inc.*, 66-3 ARB ¶ 9014 (E. J. Forsythe); *Comstock Park Public Schools*, 57 LA 279 (Alan Walt, 1971); *Glass Containers Corp.*, 71-2 ARB ¶ 8615 (Harry J. Dworkin, Arbitrator); *Simoniz Co.*, 70-1 ARB ¶ 8024 (Robert G. Howlett, Arbitrator); *W. M. Chace Co.*, 48 LA 231 (Erwin Ellmann, Arbitrator, 1966); *Avco Corp.*, 70-1 ARB ¶ 8400 4314 (Burton B. Turkus, Arbitrator, 1970).

resolve cases which *require* their attention is undermined.

As *Alexander* recognized, the grievance-arbitration process may solve the problem without the need for federal involvement. The employee may secure full relief, or "a settlement satisfactory to both employer and employee," thus eliminating all need for resort to the statutory remedy. *Id.* at 51, n. 13, 55. Alternatively the evidence adduced may convince the employee that his perception of discrimination was groundless, and thus persuade him that resort to Title VII is unjustified. *Id.* at 55.

In either event, the private machinery will have resolved the problem without the need to add yet another charge to the staggering backlog under which the EEOC labors—106,700 unresolved charges as of June, 1975, with the number growing every day[21]—and thus leave the agency free to pursue those charges which could *not* be resolved pri-

[21] Report by EEOC Chairman Lowell Perry to Senate Labor Committee on Commission's Current Status and Projected Improvements, reprinted as a special supplement to BNA, Fair Employment Practices, Summary of Latest Developments, Oct. 30, 1975 at 12. In the preceding year—the EEOC's "most successful year to date"—the EEOC had successfully conciliated less than 7,000 charges. (*Id.*, at 2.) The Chairman predicted that the backlog would grow to 127,000 by June 1976. The backlog has increased substantially each year, in part because the total number of charges filed has increased astronomically in each year of the Commission's existence, e.g. 10,000 charges filed in FY 1968 compared to 71,000 in FY 1975 and an estimated 112,000 in FY 1976.

The delays occasioned by such a backlog are only hinted at in this case. The charge, filed in February 1972, resulted in an EEOC determination in November 1973, twenty-one months later. Because the EEOC found no probable cause, no conciliation efforts were necessary; otherwise, considerably more time would have elapsed. For example, in *EEOC* v. *Occidental Life Ins. Co.*, ... F.2d .....,

vately and thus *necessitate* its attention. In like fashion, private resolution will spare the courts the additional burdens of unnecessary lawsuits.

EEOC representatives have recognized that the EEOC and the courts cannot do the job unassisted, and that the successful resolution of discrimination claims through grievance-arbitration is vital to the federal policy against employment discrimination. Hammerman and Rogoff, *supra*, at 28:

> "Experience has demonstrated that, in most instances, government is not a practical forum for convenient, inexpensive, and expeditious resolution of charges of discrimination. The time lag is too long, the procedural steps too many, and successful resolutions without resort to the courts too few.
>
> To the extent the grievance procedure is credible and effective in handling complaints of discrimination, it should achieve the following results:
>
> 1) Institutionalize in union contracts the principles and methods of equal employment opportunity, and thereby reduce resort to government procedures in handling of grievances.
>
> 2) Reduce the number of charges filed with the EEOC and its referral agencies.
>
> 3) Minimize government interference in labor-management operations.
>
> • • •
>
> 5) Minimize resort to the Federal courts."

12 FEP Cases 1300 (9th Cir. 1976), the charge was filed in December 1970, the EEOC's investigation ended in February 1972, a reasonable cause determination was made in February 1973, and suit was filed, after one conciliation meeting with the respondent, in February 1974. See also cases cited infra, p. 38, n. 31, where suits were filed three to five years after charges had been filed, conciliation not even then having been concluded.

Even where grievance-arbitration processes do not result in a resolution eliminating the need for resort to Title VII, they may materially facilitate the ultimate processing of the Title VII charge. The record made, and the arbitrator's "knowledge of the common law of the shop," *Warrior & Gulf, supra*, 363 U.S. at 582, may illuminate the issues and justify consideration—in some circumstances the according of "great weight"—to the arbitrator's decision in the Title VII proceedings, *Alexander, supra*, 415 U.S. at 60, n. 21.[22] This additional light on the situation may permit a speedier and more informed resolution of the issues raised, with less burden upon the EEOC and the courts. And if grievance-arbitration produces even a partial remedy for the employee, it will lessen the injury he suffers as he travels the lengthy Title VII road, while at the same time possibly reducing the scope of the remaining issues to be litigated. Cf. *id.* at 51, n. 13.

In sum, requiring the filing of an EEOC charge before the grievance-arbitration procedure has concluded would inject the federal government into the process at a time when the private mechanisms might yet prove sufficient to solve the problem. So long as the employee retains confidence in the private system, and elects to withhold the filing of an EEOC charge, the congressional objective would be undermined by requiring premature resort to the EEOC. Such unnecessary governmental displacement of private dispute settlement mechanisms would "adversely affect

[22] See *Chandler* v. *Roudebush*, 44 U.S.L.W. 4709 (1976). See generally Edwards, Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representation, 27 Lab. L.J. 265 (1976).

* * * the enforcement scheme of Title VII" by producing "more litigation, not less." *Alexander, supra,* 415 U.S. at 59. Permitting the grievance-arbitration process full play (so long, of course, as the employee elects to withhold his EEOC charge to allow the private process to work) inevitably will reduce the burden imposed upon the EEOC and the courts.

In *Alexander,* the Court noted that, 415 U.S. at 49,

> ". . . Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." (Emphasis added.)

As the Court there held, Congress vested in the affected employee the decision whether to invoke the formal processes of Title VII by filing an EEOC charge. *Alexander, supra,* 415 U.S. at 45. He may do so immediately, without resort to, or awaiting the outcome of, the private mechanisms established in the collective-bargaining agreement. *Id.* at 59. But we submit that the "strong suggestion" of Title VII referred to in *Alexander* requires that when the employee has confidence in those mechanisms, and prefers to use them first, his time for filing an EEOC charge should not begin to run until the process has been completed. No other construction of the limitations provisions of Title VII meets the holding of this Court that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." *Alexander, supra,* 415 U.S. at 59-60.

II.

IF THE § 706(e) TIME LIMIT DOES NOT BEGIN TO RUN FROM THE CONCLUSION OF THE GRIEVANCE-ARBITRATION PROCESS, THEN TRADITIONAL EQUITABLE PRINCIPLES MANDATE TOLLING OF THE TIME LIMIT DURING THE PENDENCY OF GRIEVANCE-ARBITRATION PROCEEDINGS.

If, contrary to our argument in Part I, this Court were to conclude that the final decision emanating from the grievance-arbitration process is not an "occurrence," and thus that the time limit of § 706(e) begins to run from management's initial announcement that an employee is "discharged," it would then become necessary to consider whether the time limit is tolled by the pendency of grievance-arbitration proceedings. In that event it is our position that, as all courts of appeals but the court below have held, the time limit *is* tolled.

The issue whether traditional principles governing equitable adjustment of statutes of limitations mandate "tolling" of the § 706(e) time limits during the pendency of grievance-arbitration proceedings resolves itself into two questions. First, is the § 706(e) period subject to the implication of equitable adjustments, as are statutes of limitations ordinarily? Second, if so, does tolling in the circumstances presented "effectuate the basic congressional purposes in enacting this humane and remedial Act, as well as those policies embodied in the Act's limitation provision?" ***Burnett*** **v.** ***New York Cent. R. Co.,*** **380 U.S. 424, 427-28 (1965).**

A

On the first question, the view of the court below, that because "[t]he Act creates a right and liability which did not exist at common law and prescribes the remedy [, t]he remedy is an integral part of the right and its requirements must be strictly followed" (Pet. App. 5a), is clearly in error. This view that there is a "distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy" (Pet. App. 6a), if it was ever the law, has been soundly rejected by this Court. For

> "(w)hile the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Burnett, supra,* 380 U.S. at 427 n. 2.

Therefore,

> the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Const. Co.* v. *Utah,* 414 U.S. 538, 559 (1974).[23]

[23] Indeed, petitioner in *American Pipe* relied upon the very passage from *The Harrisburg,* 119 U.S. 199, quoted by the court of appeals in support of its holding that § 706(e) is inflexible (Pet. App. 6a), but the Court in *American Pipe* distinguished that passage as applying only to the situation in which both the right and the statute of limitations sought to be relied upon in federal court were state-created. 414 U.S. at 557; see also *Burnett* v. *New York Central R. R. Co.,* 380 U.S. 424.

The Court of Appeals apparently viewed *Johnson* v. *REA Express,* 421 U.S. 454, as supporting its view that the time limits in § 706(e) must be literally applied. *Johnson* held that the statute of limitations applicable in 42 U.S.C. § 1981 cases, adopted from state law, is not to be tolled while an EEOC charge is pending. While the court below believed it would be anomalous to treat a federal limitations period with regard to a federal right more liberally than an adopted state limitations period, this Court in *Johnson* regarded the derivative nature of the limitations period in that case as indicating a *stricter* approach than in cases such as *Burnett* and *American Pipe,* where "the respective periods of limitation in those cases were derived directly from federal statutes rather than by reference to state law." *Johnson, supra,* 421 U.S. at 466. Moreover, in *Johnson* this Court noted that even with regard to a state limitations period, tolling would be appropriate "where [strict] application would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.,* at 465.[24]

B

Thus, the § 706(e) period is, like an ordinary statute of limitations, subject to equitable adjustment when the "policy of repose, designed to protect defendants," *Burnett, supra,* 380 U.S. at 428, is "outweighed [because] the

[24] The court below pointed to a passage in *Alexander* requiring "timely" filing of an EEOC charge as necessitating its decision (Pet. App. 5a). Obviously, the *Alexander* court did not purport to determine what constitutes "timely" filing.

interests of justice require vindication of the plaintiff's rights." *Id.* To make this determination, "we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Id.*

We have already shown that to require the filing of an EEOC charge which the employee would prefer to hold in abeyance pending final resolution of his contractual claim flies in the face of two basic statutory policies: that requirement would inject the federal government into the dispute settlement process while all parties—including the affected employee—prefer to attempt a private resolution[25]; and

[25] Title VII's policy favoring voluntary compliance through arbitration is, of course, fully congruent with the federal labor policy favoring arbitration of contractual disputes. "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command." *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974). Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Congress recognized that this policy could best be effectuated by deferring governmental intervention until resort to the private machinery had been concluded. Section 203(d) goes on to provide that the services of the Federal Mediation and Conciliation Service should be made available in "settlement of such grievance disputes only as a last resort and in exceptional cases." The policy of Section 203(d) can be effectuated "only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 566 (1960). See also *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 241 (1970); *Alexander, supra*, 415 U.S. at 59.

that requirement would compel the overburdened EEOC to undertake investigation and conciliation where neither may prove to be necessary, and thus divert its attention from those cases where agency action is essential. See pp. 22-24 *supra*.

But, it may be argued, while these points are indisputable, they can be accommodated simply by making the employee file his EEOC charge within 90 (now 180) days of the discharge even though the grievance-arbitration process, with which he is content at the critical moment, has not run its course. Such an argument overlooks both the policies of the statute and the practicalities of the situation:

1. The employee may have valid reasons for deferring the filing of an EEOC charge until he has completed his resort to the grievance-arbitration process. Once an employee files a charge with the EEOC, the charge can be withdrawn only "with the consent of the Commission." EEOC Regs. 29 C.F.R. § 1601.09. The EEOC may insist that the subject matter of the charge be resolved in the manner which *it* deems appropriate. And the EEOC's conception of an appropriate settlement may involve the addressing of problems far broader than those affecting the complaining employee. A black male's charge of mistreatment on the job, for example, may result in EEOC insistence upon a settlement addressed to the plight of white women whom the employer never hired. *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), and cases cited therein. (See also cases discussed *infra*, pp. 36-37.) As a result, the pendency of the EEOC charge can inhibit the normal workings of the grievance-arbitration process in several ways.

(a) In *Alexander, supra*, 415 U.S. at 52 n. 15, the Court

presumed that an employee could settle his claim so long as his "consent to the settlement was voluntary and knowing" and so long as it did not entail a prospective waiver of Title VII rights. The employee may forfeit that opportunity to secure a favorable settlement of his grievance if required to file a charge prior to the completion of the grievance-arbitration process. The employer, who might otherwise be prepared to settle the grievance on terms desired by the employee, may be less willing to offer such a settlement when he knows that he will not thereby solve the "problem," i.e., when he knows that the charge pending with the EEOC may still be processed.

(b) The employer, mindful that his actions may ultimately be adjudicated pursuant to the EEOC charge, may be reluctant to engage in that frank interchange which is essential to a successful grievance-arbitration process,[26] and may be reluctant to make concessions looking toward settlement of the grievance lest they ultimately be used against him in the EEOC proceeding. This stiffening of the employer's position is wholly inconsistent with the voluntary, informal, flexible format which enables the grievance-arbitration process "to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Alexander, supra,* 415 U.S. at 58.

(c) The employee may prefer to pursue the grievance-arbitration process exclusively, at least as a first resort, for other less tangible reasons. He may believe that his employer will more readily settle a grievance which is being processed "internally," i.e., through the procedural format

[26] See Elkouri and Elkouri, *How Arbitration Works* (BNA) 3d Ed. (1973), at 14-15, 110-111.

to which the employer has agreed, than when the employee has committed the "disloyal" act of bringing in the forces of the Federal Government. Likewise, the employee may believe that, even if he succeeds in securing his reinstatement, his future treatment will be more pleasant if he has not offended the employer by invoking the intervention of outside agencies.[27]

Moreover, as we have noted, it is entirely possible for an employee to process and win a grievance correcting discriminatory action taken by an employer without ever having to directly accuse the employer of being a discriminator. (For example, an employee can contest his discharge as "unjust," and secure reinstatement because the employer cannot meet its burden of proving "just cause."[28] In that event, race need never have been openly discussed in the process, yet a racially motivated discharge will have been cured as effectively as Title VII could have cured it.) The employee may believe that his prospects for securing a

[27] Employees reinstated after filing charges with the National Labor Relations Board have overwhelmingly encountered employer antagonism sufficiently strong to cause employees to quit. The only study of this subject of which we are aware showed that of 71 cases settled by the NLRB's New England regional office between July 1, 1962 and July 1, 1964, involving 194 discharged employees, of the 85 who actually went back to work, only 25 kept their jobs. "The other 60 who returned later left because of bad company treatment." Study by Leslie Aspin prepared as a Ph.D. dissertation, Summary of Findings of a Study of Reinstatement Under the National Labor Relations Act, printed Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 90th Cong., 1st Sess., on H.R. 11725, pp. 3-12 (GPO, 1968).

[28] See *supra,* pp. 16-18.

favorable settlement from the employer are enhanced when he has not accused the employer of being a racist, and when the employer's acquiescence in reinstating him does not constitute an implicit admission of such a charge. He may further believe that the treatment he will receive following reinstatement will be better if he has not accused the employer of racial discrimination.

These considerations, while subjective and intangible, are nonetheless important, and may prompt employees to prefer completion of their contractual remedies before resorting to Title VII.

Of course, if an employee ultimately fails to secure reinstatement in the grievance-arbitration process, he may then wish to resort to the "plenary" powers of Title VII. *Alexander, supra,* 415 U.S. at 45. But it hardly follows that he should be forced to invoke the government's aid prematurely, when in his judgment his prospects for reinstatement are better served by keeping the dispute confined to the private machinery. If the compulsion for premature invocation of federal intervention sufficiently devalued the grievance-arbitration process that employees opted not to resort to it, "the possibility of voluntary compliance or settlement of Title VII claims would be reduced, *and the result could well be more litigation, not less.*" 415 U.S. at 59 (emphasis added).

2. There is yet another cost in requiring premature EEOC filings. Employees are generally familiar with the grievance-arbitration process,[29] and with the "rule" that they

[29] It has been estimated that ten to twenty grievances are filed each year under collective bargaining grievance procedures for each one hundred employees. S. Slichter, S. Healy, and E. Liverness, *The Impact of Collective Bargaining on Management* (1960). Thus, an employee working in a plant covered by such a procedure has a fair chance of having filed a grievance himself in the past year and is almost certain to be aware of others who have used the procedure. The grievance procedure, is "an integral part of the administration of the enterprise" when it is in effect. Feller, *A General Theory,* 61 Calif. L. Rev. at 755.

must exhaust their grievance procedure before resorting to outside remedies. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650. It is inevitable that many employees will follow the normal course and will not consider resort to the EEOC until they have exhausted the grievance procedure. Thus, unless the time limit runs from the conclusion of the grievance-arbitration process, it is probable that many employees will forfeit their right to use Title VII.

We have shown that the policies of Title VII point strongly toward tolling the statutory time limit until the completion of the grievance-arbitration process. There remains the question of what costs would be incurred by tolling. In *theory,* it might be imagined that tolling would produce some measure of delay in final resolution, some harm to the policy favoring repose of disputes after a given time period has expired, and, in certain instances, a delay in notifying the respondent of the complaint against him, so that he can marshall witnesses and evidence promptly. Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U.S. 342, 348-349. In *practice,* given the current state of the EEOC backlog, the judicial interpretations divesting the EEOC charge of any notice-giving function, and the peculiar statutory structure which permits suit to be filed literally years after the charge is filed, there

is an air of complete unreality about concerns over notice and delay; indeed, tolling *increases* the employer's likelihood of receiving early notice of the charges against him.

First, filing an EEOC charge does not, although perhaps it should, result in notice to the respondent of the allegations upon which suit may later be filed. The courts have held that suit may be filed based on any claim uncovered in the EEOC investigation, even matters wholly outside the scope of the allegations contained in the charge. *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), and cases cited therein; *EEOC* v. *Occidental Life Ins. Co.*, ... F.2d ....., 12 FEP Cases 1300, 1305-07 (9th Cir. 1976). Thus a charge filed by incumbent black male employees, complaining only of the employer's treatment of them on the job, may give rise to a lawsuit seeking remedies for the employer's refusal to hire white females. *General Electric, supra.* And a charge filed by a woman, alleging sex discrimination because of her treatment during pregnancy and maternity, may result in a lawsuit alleging discrimination against men in the administration of a retirement system. *Occidental Life, supra.* See also *De Figueiredo* v. *TWA*, 322 F. Supp. 1384 (S.D.N.Y. 1971) (charge of discrimination against women filed by hostess resulted in suit by male flight purser alleging discrimination against males); *EEOC* v. *Raymond Metals Co.*, 530 F.2d 590, 596, 597 (4th Cir. 1976) (charge of national origin discrimination may result in suit for race and sex discrimination; *Patterson* v. *American Tobacco Co.*, ... F.2d ....., 12 FEP Cases 314, 324 (4th Cir. 1976) (charge of discrimination against men may give rise to suit for discrimination against women); *EEOC* v. *Louisville & Nashville R. R. Co.*, 505 F.2d 610, 612, 617 (5th Cir.

1974) (charge alleged racial discrimination in refusal to hire employee due to false statements in employment application; EEOC, finding no reasonable cause to sue over the charging employee's treatment, sued instead challenging the employer's consideration of arrest records and use of tests in making other hiring decisions).

Second, the filing of a charge with the EEOC does not necessarily mean that the employer will promptly learn of the charge's existence. Although the 1972 Amendments to Title VII require notice to the respondent of a charge within ten days of its filing, 42 U.S.C. § 2000e-5(b), this rule has not necessarily been complied with or enforced by the courts. See *EEOC* v. *Exchange Security Bank*, ... F.2d ....., 12 FEP Cases 1067 (5th Cir. 1976) (EEOC failed to serve notice of the charge upon the respondent for eighteen months). Cf. *EEOC* v. *South Carolina National Bank*, ... F.Supp. ....., 12 FEP Cases 843 (D.C.S.C. 1976). (improper notice of charge served fifteen months late; proper notice served three years late.)

Third, the statutory scheme imposes no time limit within which suit must be filed. Because of its backlog, the EEOC may take several years to process a charge through investigation, probable cause finding, and conciliation. Once 180 days have elapsed, the charging party can request a right-to-sue letter and proceed to court, EEOC Regs. § 1601.25(c), but he is not required to do so. Instead, if the statutory processes have not been concluded, he may wait as long as he wishes and then, whenever he is ready to sue, request the right-to-sue letter.[30] Even where the EEOC itself de-

[30] See, e.g., *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796-797 (1973) (suit filed three years after charge filed).

cides to institute suit, delays between charge filing and suit filing often consume three to five years.[31] And when suit *is* filed, legal proceedings may be interminable.[32]

In the real world, therefore, the slight delays occasioned by computing the time limit for filing EEOC charges from completion of the grievance-arbitration process rather than from the date of discharge impose no costs whatsoever upon statutory interests.[33] Indeed, the grievance-arbitration process is likely to accord the employer many of the protections which he is *not* furnished by the statutory machinery. Because of the need quickly to air grievances before they impede productivity, and because of the possi-

[31] See, e.g., *EEOC* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974), cert. denied 420 U.S. 946 (1975) (four and a half years); *EEOC* v. *Meyer Brothers Drug Co.*, 521 F.2d 1364 (8th Cir. 1975) (three years); *EEOC* v. *E. I. duPont de Nemours & Co.*, 516 F.2d 1297 (3rd Cir. 1975) (nearly three years); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975) (three and a half years); *EEOC* v. *Louisville & Nashville R. R. Co.*, 505 F.2d 610 (5th Cir. 1974) (three years). Although the courts in the cited cases permitted the suits to proceed despite the lengthy delays, courts in three recent cases, declaring the delays "inexcusable," dismissed EEOC suits for laches. *EEOC* v. *South Carolina National Bank*, ... F.Supp. ....., 12 FEP Cases 843 (D.C. S.C. 1976) (four years); *EEOC* v. *Moore Group, Inc.*, ... F.Supp. ....., 12 FEP Cases 868 (N.D. Ga. 1976) (five years); *EEOC* v. *Metro Atlanta Girls' Club*, ... F.Supp. ....., 12 FEP Cases 871 (N.D. Ga. 1976) (three years).

[32] *Albermarle* reached this Court in its ninth year. 422 U.S. at 408.

[33] As against the time periods for EEOC charge processing discussed above, compare the statistics for arbitration. Federal Mediation and Conciliation Service, *Twenty-Seventh Annual Report, Fiscal Year 1974*, at 48; Davis and Pat, *Elapsed Time Patterns in Labor Grievance Arbitration:* 29 Arb. J. 15, 21 (1974).

bility of retroactive liability, grievance-arbitration procedures usually contain time limits both upon filing grievances and appeals and upon answers thereto much shorter than any public statute imposes.[34] And these strict time limits encourage the parties to speak to witnesses within days of any event grieved. These procedures thus are likely to provide respondent employers with a better opportunity to preserve evidence and witnesses for later litigation than if the employee opted to forego his contractual remedy and instead filed a Title VII charge immediately. In sum, while affirmance would dispense with this lawsuit, it would do much harm and no substantial good to the system of remedying employment discrimination charges.

The foregoing analysis demonstrates both that here there is a "significant underlying federal policy that would • • • [conflict] with a decision not to suspend the running of the statute," *Johnson, supra*, 421 U.S. at 466, and that the real costs to the defendant of tolling in this instance are miniscule. As *Alexander* recognized, Title VII embodies a preference for voluntary settlement and conciliation, and the grievance-arbitration process is often an effective means toward this end. See pp. 19-25, *supra*. A non-tolling rule could both impede use of the grievance-arbitration process

[34] Courts of Appeals have generally adopted a flexible approach to Title VII limitations periods even when they have denominated the periods as "jurisdictional." See, e.g., *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson* v. *Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972); *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972) (see also *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975); *Harris* v. *National Tea*, 454 F.2d 307 (7th Cir. 1971); *Harris* v. *Walgreen's*, 456 F.2d 588 (6th Cir. 1972). Cf. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928-931 (5th Cir. 1975).

and, in some instances, result in forfeiture of Title VII rights by lay employees used to operating under the rules of the shop.

Nor would tolling the statute of limitations in this circumstance be in any way inconsistent with the holding in *Johnson, supra*. The issue in this case is not, as it was in *Johnson*, whether one statutory route for judicial relief regarding employment discrimination is to be adjusted by tolling to accommodate an entirely separate Congressional scheme for providing such relief. Rather, the question is whether the policies underlying Title VII *itself*, which prefer voluntary settlement without litigation, dictate tolling Title VII time limits to preserve the grievance-arbitration forum as an effective means to voluntary settlement.[35] While here, as in *Johnson*, the two remedies pursued are *legally* independent, here, unlike *Johnson*, it would be inconsistent with the very remedial scheme sought to be invoked to discourage or fail to accommodate resort to grievance-arbitration procedures. Thus, in *Johnson* there was "no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independ-

[35] Consistently with the concept that a collectively bargained grievance-arbitration process creates a different employee-employer relationship than would otherwise obtain, the courts which have recognized a rule tolling the time for filing a Title VII charge during the pendency of a grievance proceeding have uniformly, and in our view correctly, applied the rule only when a formal pre-determined set of procedures acceded to in advance by the employer was invoked, and not when the plaintiff claimed to have made ad hoc attempts, outside of any agreed-upon procedure, to discuss the claim. See, e.g., *Moore* v. *Sunbeam Corp., supra*, 459 F.2d at 827; *Dudley* v. *Textron, Inc.*, 386 F.Supp. 602 (E.D. Pa. 1975).

ently," 421 U.S. at 466; here, the policy reasons are substantial, so that the minimal potential harms to the respondent are "outweighed." *Burnett, supra*.[36]

III.

THE 1972 AMENDMENT TO TITLE VII EXTENDING THE TIME LIMIT FOR FILING AN EEOC CHARGE FROM 90 TO 180 DAYS APPLIES TO CHARGES PENDING WITH THE EEOC ON THE EFFECTIVE DATE OF THE AMENDMENT.

The issues discussed heretofore, concerning the accommodation of the § 706(d) time limit to grievance-arbitration procedures, are the more important, in the Union's view, of the questions involved in this case. The remaining question, involving the applicability of the expanded time limits created by the 1972 amendments to charges filed with the EEOC before the effective date of the amendments and not dismissed before that date, has pertinence only to a relatively small number of still active charges or court cases—those in which charges were filed with the EEOC prior to March 24, 1972 (the effective date of the 1972 amendments),

[36] Parenthetically, it should be noted that at least part of the rationale in *Johnson* was apparently that given the "frequently protracted period of EEOC consideration," 421 U.S. at 467-468 n. 14, the delay period resulting from tolling could be lengthy. Here, the character of EEOC procedures has the opposite import: because of the very problem *Johnson* noted, the additional harm to respondent from tolling is likely to be minimal. Similarly, the concern evidenced in *Johnson* for fair, timely notice to respondents, 421 U.S. at 467-468, is of less consequence here, since the notice obtained from an EEOC charge has neither had the specifity nor effect of the judicial complaint to which respondent in *Johnson* was entitled. See pp. 36-37, *supra*.

more than 90 days after the "occurrence" and were pending with the EEOC on March 24, 1972, less than 180 days after that occurrence. The first question presented, on the other hand, is of significance to EEOC charges filed both before and after the 1972 amendments, and will continue to have relevance to charges filed in the future.

Ms. Guy, however, is quite clearly entitled to reversal of the dismissal entered by the district court even if this Court determines that former § 706(d) must be read so as to calculate the running of the limitations period from the date of her discharge. For § 14 of the Equal Employment Opportunity Act of 1972 states that:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and to all changes filed thereafter" (Pet. App. p. 31a).

The provision expanding the charge filing period to 180 days amended § 706 of the 1964 Act,[37] so that § 14 in terms applies to that charge: Ms. Guy's discharge occurred 150 days before the effective date of the 1972 Act; on that effective date, her discharge had not been dismissed by the Commission. Thus, Ms. Guy's charge was, within the ordinary meaning of the language, "pending with the Commission on the date of the enactment of the Act." Further, had her charge been filed on March 24, 1972, or any of the thirty succeeding days, it would have been timely filed within the literal language of new § 706(e) and § 14 of the 1972 Act.[38] Since "t[o] require a second 'filing' by the aggrieved party

[37] See n. 7, *supra*.

[38] If there is any ambiguity at all in the word "pending"—that is, if there is any possibility that Congress meant "pending"

• • • would serve no purpose other than the creation of an additional procedural technicality," *Love* v. *Pullman Co.*, 404 U.S. 522, 527, the EEOC was entitled to "properly hold [the] complaint in 'suspended animation,' automatically filing it upon [the effective date of 1972 Amendments]." *Id.*

Yet, the majority on the court below, without noting § 14 of the 1972 Act at all or explaining why it is not to be applied in accordance with its plain language, and without citing any authority, maintained that "[p]laintiff Guy's claim was barred on January 24, 1972 [and] [t]he subsequent increase of time to file the charge enacted by Congress, could not revive plaintiff's claim which had been previously barred and extinguished" (Pet. App. 8-9a).

The notion that a legislature may not revive a time barred claim was long ago put to rest. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 311, 314, stated:

> "In Campbell v. Holt, 115 U.S. 620, supra, this Court held that where lapse of time has not invested a party with title to real or personal property, • • • legislature • • • may repeal or extend a statute of limitations, even after right of action is barred thereby, [and] restore to the plaintiff his remedy [.] • • •
>
> • • •
>
> "Statutes of limitation find their justification in neces-

charges to encompass only those charges filed before March 24, 1972, still before the Commission, *and* timely when filed—the ambiguity is eliminated by the legislative history. For the intent was that § 14 covered "charges *filed with the Commission prior* to the effective date of the Act." Committee Leg. Hist. at 1851 (Section-by-Section analysis of Conference bill). *See also id.*, at 1777 (Section-by-Section analysis of Senate bill). Certainly, Ms. Guy's charge was "filed • • • prior to the effective date of the Act," whether or not it was timely when filed.

sity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers* v. *Railway Exp. Agency*, 321 U.S. 342. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

The fact that a limitations period is contained in the statute creating the right is no longer considered to render the limitations period necessarily inseparable from the right created. *American Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 556-59; *Burnett* v. *New York Cent. R. R.*, 380 U.S. 424, 426-27 & n. 2. The question is one of legislative purpose and intent. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 360. Thus, to the extent that *William Danzer & Co.* v. *Gulf & Ship Island R. R.*, 268 U.S. 633, relied on some fundamental distinction in this regard between limitations periods contained in statutes creating new rights and other limitations statutes, it is no longer good law. Moreover,

"[a] close reading of *Chase Securities* indicates that

> the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability. Rather, the Court relied on the fact that, for the reasons suggested, Congress *had intended* the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy alone. 325 U.S. at 312 n. 8." *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 833, n. 7 (9th Cir. 1975).

Of course, statutes of limitations, like other legislation, may not be applied retroactively if "doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711. But this case, like *Chase Securities, supra*, "is not a case where [respondent's] conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it [engaged in unlawful discrimination] depending on a statute of limitation for shelter from liability." 325 U.S. at 316. Nor is there any reason to believe that between January 24 and March 24, 1972, the evidence available for respondent's defense was eliminated in reliance upon he barring of the claim.[39]

The "statutory direction" appears, as noted, plainly not

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[39] Indeed, on January 24, 1972 and at the time the charge was filed on February 10, 1972, respondent had every reason to believe such a charge would be held timely. There was then Sixth Circuit law indicating that § 706(d) time limits could be tolled during the pendency of grievance proceedings. *Schiff* v. *Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970). Moreover, Ms. Guy could have filed an action under 42 U.S.C. § 1981 with regard to her discharge at least until October 25, 1972 (Pet. App. 15a), and the same evidence and witnesses would have been pertinent.

only to permit but to direct that the 180 day time limit apply at least to all claims which could have been filed timely under the March 24, 1972 amendment on or after that date. This Court has recently noted and, seemingly, approved the holding in *Brown* v. *General Securities Administration*, 507 F.2d 1300 (C.A.2 1974) that the 1972 Act granting federal employees the right to sue under Title VII as a remedy for employment discrimination is to be applied to charges of discrimination filed before the amendments were passed, *Brown* v. *United States*, ... U.S. ....., 44 U.S.L.W. 4704, 4705 n. 4 (1976), Cf. *Place* v. *Winberger*, ... U.S. ....., 44 U.S.L.W. 3718 (granting rehearing, vacating denial of certiorari, and remanding for consideration in light of *Brown*). Yet, in *Brown* there was no express statutory command that the remedy for federal employees was to apply to pre-filed charged. If the 1972 amendments can create a right to sue in court where there was not necessarily such a right before those amendments at all (see *Brown*, 44 U.S.L.W., at 4706) without an explicit Congressional expression of intent in that regard, surely those same amendments must be held, where there is such an expression of intent, to merely extend in time a right to sue already grantd in 1964.

Finally, "[t]here is no substantial reason [in the legislative history] for giving less than their full meaning to the words of section 14." *Davis* v. *Valley Distributing Co.*, *supra*, 522 F.2d at 831.[40] True,

[40] There is no distinction between *Davis* and this case of any conceivable relevance. In both cases the charge was first filed with the EEOC more than 90 days after the occurrence complained of and before the effective date of the 1972 amendment. In both cases, the charge would have been timely within the literal language of § 14 if first "filed" after March 24, 1972.

In *Davis*, the EEOC charge, first filed on March 14, was referred to a state agency because the complainant had failed to exhaust his state remedies and was consequently not *considered* filed until after March 24. Here, all procedural prerequisites to EEOC consideration were complied with before the charge was filed on February 10, and referral was unnecessary. Surely, Ms. Guy cannot be prejudiced by the fact that she had not failed, as *Davis* had, to meet one of Title VII's procedural prerequisites.

> "Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger* v. *Ball*, 497 F.2d 702, 708 (4th Cir. 1974). [See also 118 Cong. Rec. 4816 (1972).] But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods was called to Congress' attention by committee reports and in floor debate. [See 118 Cong. Rec. 7167, 7565 (1972); S. Rep. No. 415, 92 Cong., 1st Sess. 2, 36-37 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 27 (1971)]. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized." [See 118 Cong. Rec. 7166, 4941 (1972).] *Davis, supra*, 522 F.2d at 831 (footnotes omitted).

Since there is nothing in the legislative history to refute the "conclusion that Congress intended the extended limi-

tations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period," 522 F.2d at 830, § 14 must be read as written. Ms. Guy is therefore entitled to her day in court on this basis if not on the grounds discussed in Parts I and II, *supra*.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

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July 9, 1976

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are:

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964), which reads as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) Section 706(b) and (e) of the Civil Rights Act of 1964, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)), which reads as follows:

> Sec. 706. • • •
>
> (b) • • • If the Commission determines after such investigation that there is reasonable cause to determine that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion. • • •
>
> • • •
>
> (e) In the case of any charge filed by a member of

the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972), which reads as follows:

Sec. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

(4) Section 201 and 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 152, 153 (June 23, 1947) (29 U.S.C. §§ 171 and 173(d)), which in pertinent part read as follows:

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees

through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

• • •

SEC. 203. • • •

• • •

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
46 North Third Street, Suite 1004
Memphis, Tennessee 38103

District Office

Case No.: YME4-155
Charge No.: TME2-0601

DORTHA A. GUY
60 West Davant
Memphis, Tennessee 38109

Charging Party

ROBBINS & MYERS, INC.
(Hunter Fan Division)
2500 Frisco Avenue
Memphis, Tennessee 38114

LOCAL 790, INTERNATIONAL
UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS
(AFL-CIO)
2881 Lamar Avenue
Memphis, Tennessee 38114

Respondents

DETERMINATION

Under the authority vested in me by Section 1601.19b(d) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission the following determination as to the merits of the subject charge.

Respondents are an employer and labor organization, respectively, within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

Charging Party, a Negro, states she was discharged while on sick leave, even though established procedures were

followed in obtaining leave. She alleges Respondent Employer discharged her and that Respondent Labor Organization failed to represent her because of her race.

Respondent Employer denies the charge and contends that Charging Party was discharged in accordance with the provisions of its collective bargaining agreement. Respondent Employer further contends that Charging Party had been on a number of sick leaves, was a union steward, and was well aware of the sick leave policy.

Article V, Section 14, (item f) of the collective bargaining agreement states that seniority shall be broken if the employee fails to return to work or fails to report to the personnel office and give a satisfactory reason for failure to return to work on the first scheduled work day following expiration of leave.

It is undispuated that Charging Party was scheduled to return to work on October 26, 1971. She did not return to work, but visited her doctor. Charging Party states she called Respondent Employer's answering service and left word that she was unable to report to work. Respondent Employer denies that it received such a call. Charging Party is unable to explain why she did not call during business hours and talk to personnel officials.

During the investigation, Charging Party stated that as union steward, she assisted two Blacks in getting reinstated under similar circumstances. She states one employee provided proof that he was hospitalized and was physically unable to report or call in. She does not recall the details of the other. The record shows that in January 1971 a Caucasian was discharged because she failed to report or call

upon expiration of leave. Due to efforts of union officials, this employee was reinstated 3 months later after providing a statement from her physician that she was emotionally upset and therefore unable to call.

Respondent Labor Organization denies Charging Party's failure to represent allegation. Union officials contend that even though Charging Party failed to provide evidence that she was unable to act on her behalf on the day in question, her grievance was processed to the third step where it was denied. The record supports Respondent Labor Organization's contentions. Evidence also shows that Respondent Labor Organization processed 5 other grievances on behalf of Charging Party during her employment.

Based on the above, the Commission finds no reason to believe that race was a factor in the decision to discharge Charging Party or that Respondent Labor Organization failed to represent her because of her race.[1]

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court within 90 days of her receipt of this letter, and by taking the other procedural steps set out in the enclosed Notice of Right to Sue.

On behalf of the Commission:

CHARLES A. DIXON, *District Director*

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[1] Commission Decision 70-547, Employment Practices Guide (CCH) Para. 6123.